No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

THE MEDICAL SOCIETY OF NEW JERSEY; and W.C., M.D.,

Petitioners,

—v.—

BERNARD ROBINS, M.D., individually and in his official capacity as President of the New Jersey State Board of Medical Examiners; ELEANOR BERNSTEIN, individually and in her official capacity as a Deputy Attorney General of the State of New Jersey; THE NEW JERSEY BOARD OF MEDICAL EXAMINERS; THE DIVISION OF CONSUMER AFFAIRS OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE DIVISION OF LAW OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE STATE OF NEW JERSEY; and "JOHN & JANE DOES 1-20", whose real identities are at this time unknown to the plaintiffs,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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January 3, 2000

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QUESTIONS PRESENTED

1) Did the New Jersey Supreme Court err by failing to reverse the Appellate Division's finding that the case was moot?

2) Did the New Jersey Supreme Court err by failing to hold *N.J.S.A.* 45:1-18 unconstitutional?

3) Did the New Jersey Supreme Court err in failing to correct the Appellate Division's application of the wrong standard in analyzing the administrative Demand for Inspection at issue in this case?

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this petition by way of writ of certiorari, and to decide this matter, pursuant to 28 U.S.C. § 1257(a), in that the petitioners seek review of a final judgment or decree[1] rendered by the Supreme Court of New Jersey, the highest court of that State in which a decision could be had, in which the validity of a statute of the State of New Jersey is drawn into question on the grounds of its being repugnant to the Constitution of the United States, and in which a title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

N.J.S.A. 45:1-18 is unconstitutional, as it authorizes and permits warrantless searches of physicians' offices by administrative fiat, without opportunity for prior judicial review. The petitioner was subjected to a warrantless search of her medical office without opportunity for prior judicial review, and by being coerced into abandoning her Constitutional rights by reason of the State of New Jersey's imposition of its "duty to cooperate" regulation, in violation of her rights under the Fourth and Fourteenth Amendments to the Constitution.

STATEMENT OF THE MATTER INVOLVED

The petitioner, the Medical Society of New Jersey ("MSNJ"), is our nation's first state society of physicians. Founded in 1766, the MSNJ is the primary organization of physicians in New Jersey. Approximately nine thousand five hundred physi-

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[1] With respect to the serious Constitutional issues raised by this Petition, the decree of the Supreme Court of New Jersey denying certification was a final judgment. In leaving the Appellate Division's rulings in place, the New Jersey Supreme Court implicitly endorsed that portion of the lower court's ruling remanding a statutory 28 U.S.C. § 1983 claim which the Appellate Division found "technically" remained pending, while also pointing out "the limited ability to proceed against State officials under § 1983." *See* Appendix, Appellate Division opinion at 9-10.

cians hold individual memberships in the MSNJ. For more than 230 years, the Medical Society of New Jersey has been the state's leading voice in the health care field. The MSNJ's mission is to promote the quality of health care and health services for all citizens of the state and to supply leadership and assistance to its physician members. To fulfill this mission, the MSNJ regularly participates in important issues in the judicial, legislative and regulatory arenas.

The MSNJ has played a leadership role concerning contemporary legal and ethical issues confronting modern medical practice and has historically helped to shape and implement landmark judicial and legislative initiatives concerning the impact of juridical issues upon the practice of medicine. Through its Committee on Biomedical Ethics, the MSNJ has developed policies and positions addressing the roles of physicians, patients and hospitals and their concomitant rights, duties and obligations to the larger society physicians are privileged to serve.

The petitioner, W.C., M.D. (hereinafter, "W.C."), is a physician duly licensed by the State of New Jersey to practice medicine and surgery. She is a member of the MSNJ.

This petition invites this Court to reestablish the fundamental right of physicians and their patients to be free from overbroad, unannounced, warrantless searches of physicians' offices. The New Jersey Board of Medical Examiners (the "Board") and the Attorney General of New Jersey (the "AG") have conducted, and continue to conduct, such searches, without prior judicial review, encompassing patient records, books, private belongings, privileged materials and other documents. Such actions are in clear violation of the guarantees embodied in the Fourth and Fourteenth Amendments to the Constitution of the United States.

This case involves a warrantless search of the offices of the petitioner, W.C., through the vehicle of a self-styled "Administrative Demand for Inspection." W.C., upon advice of coun-

sel, initially objected to the scope of the inspection and sought judicial review.

The relevant facts, in brief, are as follows. Sometime in 1995, an indigent patient complained to the Board that Dr. W.C. had provided her with a free sample of medication which had stamped on its package a precedent expiration date. The drug was Voltarin®, a non-scheduled, non-controlled drug similar to the over-the-counter pain relievers Aleve® and Advil®.

In 1997, the Board of Medical Examiners determined to take no disciplinary action against W.C. for providing this free sample to an impecunious patient. Indeed, at that time, there was no prohibition against providing outdated samples, and the scientific literature is replete with articles suggesting that most medications are safe and effective for as many as ten years beyond their manufacturer-stated expiration dates.

Despite these facts, the Board ordered its Enforcement Bureau to conduct "an unannounced cost effective inspection of W.C.'s office to check for outdated medications." This action was, by definition, without probable cause, as the Board had already determined that Dr. W.C. had not violated the Medical Practices Act or other law. Moreover, there is no known or reported case of patient injury resulting from use of this, or any similar medication, beyond its expiration date.

Compounding the Board's improper action, the Enforcement Bureau investigators determined that they would not follow the Board's express directive limiting the search to "a cost effective inspection of outdated medications." Rather, pursuant to an "unwritten policy," investigators from the Enforcement Bureau discussed the matter with one of the less senior Deputy Attorneys General assigned to the Board, Eleanor Bernstein, Esq.

They had Ms. Bernstein execute a "standard" form Administrative Demand for Inspection of Professional Premises that they use "most of the time." This was done with the understanding that the investigator was to perform a complete inspection of every item in the doctor's office, even though the Board specifically directed that the search be limited to "outdated medications."

An analysis of the Demand signed by DAG Bernstein demonstrates that it provided for a search of everything contained within W.C.'s offices, with one exception—outdated medications. Specifically, the Demand for Inspection provided that:

> PETER VERNIERO, Attorney General of New Jersey, by Eleanor G. Bernstein, Deputy Attorney General, hereby demands to inspect, videotape, and photograph the premises and to inspect the licenses of all licensed personnel, job descriptions of all employees, the records, books, appointment books, documents, and billing records, and equipment maintained in the regular course of the licensed practice at the identified location.

The search was initially to be conducted immediately upon service, without prior notice or opportunity to object. No limitations, whatsoever, were placed upon the investigators' discretion. By admission, there was no reason why the Demand for Inspection could not have been limited to an inspection of all medications maintained at the premises.[2]

The over-breadth of the Demand and total lack of any limitation on the search was conceded by the investigator who was to conduct the search. She testified that she understood that she was authorized to search all equipment and that she interpreted the word "equipment" to be so broad as to encompass all books, records, and anything else used in the regular course of the practice of medicine.

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[2] W.C. never objected to an inspection of the medications she maintains on her premises.

When the defendants' investigators arrived, W.C. gave them total freedom to inspect the entirety of her office premises and everything within the offices that was in plain view, including her equipment. The inspectors never asked W.C. for permission to inspect the medications she maintained. The investigators were able to inspect the overall appearance of the premises, medications, cleaning agents, the manner in which patient records were stored and maintained, and the equipment used by the physician. W.C. did, however, on the advice of counsel, resist the investigators' demand to rummage through her personal effects and rifle through her desk, cabinets, files and patient records.

The deputy attorney general who signed the Demand for Inspection took exception to this reasonable limitation imposed upon her investigators. However, instead of seeking judicial review and enforcement of her Demand before seeking to impose disciplinary sanctions, as mandated by the United States Supreme Court, she sought "an end-run" around W.C.'s constitutionally mandated right to prior judicial review by seeking enforcement and sanctions directly from the Board. She did so by bringing an Order to Show Cause before the defendant Board, asking it to take disciplinary action against W.C. on the grounds she had refused, upon advice of counsel, to comply immediately with the deputy's facially unconstitutional Demand for Inspection. The deputy also asked the Board to impose not only punitive sanctions for W.C.'s initial refusal to fully comply with the deputy's unlawful demand, but continuing sanctions, including license suspension, until W.C. agreed to succumb to that Demand.

The Board, of course, is not a judicial body, but rather an administrative agency within and under the direction of the Department of Law and Public Safety, as part of the Division of Consumer Affairs. The Department of Law and Public Safety is headed by the Attorney General of New Jersey. It is that same Attorney General who, through his deputy, issued the original Demand for Inspection, and then attempted to

enforce it through his field investigators, working in the Enforcement Bureau. The Enforcement Bureau is also under the Attorney General's jurisdiction as part of the Division of Consumer Affairs.

The Attorney General then sought enforcement and sanctions before the Board, which is, likewise, within his control and jurisdiction, and to which he provides legal counsel and advice. As such, the only review of this matter has been by way of a demand by the Attorney General that an administrative Board, under the direct control and influence of his Office, enforce his Office's own abusive investigative scheme, and sanction the physician for her failure to abide his Office's arbitrary and capricious demands.[3]

During a hearing on the Attorney General's Order to Show Cause before the Board, the clear overreaching of the Demand for Investigation was confirmed by the supervisor of investigations who admitted that there was no nexus between books, records, appointment books, documents and billing records, and outdated medication; no nexus between the licenses to be inspected and outdated medications; no nexus between job descriptions and outdated medications; and no nexus between maintenance of equipment and outdated medications. Nor could the defendants enunciate any public policy which precludes a physician from maintaining on premises outdated samples of medication.

On December 10, 1997 the Board rubber-stamped the Attorney General's demands. In light of the Board's prior direction that the inspection be a "cost effective" inspection limited to outdated medications, the Board determined that it had, in fact, previously authorized the scope of the search set forth in

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[3] The defendant Board is a sub-component of the defendant Division of Consumer Affairs; the defendant Division of Consumer Affairs is a sub-component of defendant Department of Law and Public Safety; and the Attorney General is the cabinet level head of the Department of Law and Public Safety and to bring it full circle, the prosecutor of W.C. before the defendant Board.

the Attorney General's Demand for Inspection of W.C.'s office. The "Board Order" further "found" that W.C.'s failure to permit a full inspection of the equipment and records in her office, including but not limited to medications and records maintained in drawers and cabinets in her office, violated its "duty to cooperate" regulation, *N.J.A.C.* 13:45-C-1.3.[4]

The Board ordered W.C. to cooperate fully with an inspection no later than January 8, 1998. The Board ordered that the inspection would include items located in the drawers and cabinets in her office. The Board also directed W.C. to pay a monetary penalty of $1,000 for her prior violation of her duty to cooperate, but ordered that penalty stayed if the inspection were permitted by January 8, 1998.

The Board's findings are contained in a "Final Decision and Order" purportedly executed by the President of the Board on Christmas Day, December 25, 1997. This "Final Decision and Order" is twenty-three pages in length. Its language and contents are that of the deputy Attorney General who composed it. It was never seen or approved by the Board, before its filing. As such, the "Final Order" is nothing more than a document prepared by the very party seeking the constitutionally prohibited power to compel, through threat of license suspension, warrantless administrative searches, without the Constitutionally guaranteed right to prior judicial review.

The plaintiffs then made application to the Superior Court of New Jersey, Chancery Division, for an order enjoining the Board's unlawful search demand. The Chancery Division, at the urging of the defendants, without adjudicating the reasonableness of the Demand for Inspection before enforcement, determined that jurisdiction was in the Appellate Division of the Superior Court and transferred jurisdiction.

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[4] All adverse findings by the Board are reported, by law, to the National Practitioner Data Bank. Any adverse action report, even a stayed fine, can result in the inability of a physician to obtain or maintain hospital privileges or managed care contracts. As such, serious repercussions can be anticipated from even "stayed" actions.

The Appellate Division, again with the urging of the defendants, refused to provide emergent relief, thus refusing to adjudicate the reasonableness of the Board's search demand. The plaintiffs then sought review by the Supreme Court of New Jersey. That Court, yet again with the urging of the defendants, similarly refused to adjudicate the reasonableness of the Board's search demand.

On January 28, 1998, the Board issued an "Order Amending Date" ordering a search of identical scope as that originally demanded, to be conducted on or before February 6, 1998.

Efforts to obtain judicial review by the United States District Court for the District of New Jersey were then made on February 4, 1998. The Federal Court, on that date, refused to address the merits of the case, accepting the argument of the defendants that it lacked subject matter jurisdiction because the Superior Court, Appellate Division, could have decided the merits of this case upon its review.

On February 6, 1998, three agents of the defendants conducted a search of W.C.'s office, opening virtually every door, drawer and cabinet of her office, including her desk drawers, and otherwise inspecting her offices and equipment, including her kitchen sink, thus invading her Constitutional rights and the privacy rights of her patients, in the process.

That inspection was videotaped by both the petitioners and defendants. The defendants have strenuously objected to having a court view the videotapes, which demonstrate the nature and extent of the invasion upon W.C. and her office. The very fact that the defendants have collectively determined to prevent any court review of the videotapes speaks volumes. Were the Court provided the opportunity to view these tapes, it would, no doubt, be offended by the breach of privacy and overreaching of the defendants.

In a decision issued and filed on June 1, 1999, 5a, the Appellate Division ruled that W.C.'s action was moot, on the grounds that she had complied with the demand and that the defendant Board had, therefore, agreed to impose no sanctions. Despite its finding of mootness, the Appellate Division nevertheless saw fit to opine upon the merits of the case. In its rationale, however, the Appellate Division failed to address the central issues in the appeal; the overbreadth of *N.J.S.A.* 45:1-18 and the fact that there is still no recourse to obtain judicial review of an overbroad administrative Demand for Inspection.

By way of petition for certification, the MSNJ and W.C. sought review of the Appellate Division's decision by the Supreme Court of New Jersey. The defendants, as well, filed a cross-petition for certification. By Orders dated October 6, 1999, the Supreme Court of New Jersey denied both petitions. 1a-4a.

ERRORS COMPLAINED OF, REASONS WHY CERTIORARI SHOULD BE GRANTED AND COMMENTS UPON THE DECISION BELOW.

POINT I

THE NEW JERSEY SUPREME COURT ERRED IN FAILING TO REVERSE THE APPELLATE DIVISION'S HOLDING THAT THE MATTER WAS MOOT.

Based upon the fact that Dr. W.C. had allowed the overbroad search of her office to go forward, and upon a finding that the Board had therefore decided to not impose sanctions against her, the Appellate Division ruled that the appeal was moot. 6a-7a. This decision ignored fundamental constitutional concerns raised by the plaintiffs. The inaction on the part of the New Jersey Supreme Court simply leaves the Appellate Division's infirm ruling in place.

The Appellate Division did not even address the unconstitutional, strong-arm tactics employed by the defendants. The search in question went forward not on the basis of any voluntary consent given by Dr. W.C. Instead, she was given an ultimatum; either permit the search on or before February 6, 1998, or lose her license to practice medicine on the basis of her "failure to cooperate." Despite repeated pleas for court intervention to rule upon the permissible limits of any search, she was denied any relief and was forced to make a Hobson's choice of submitting to an illegal search or possibly losing her livelihood.

In analyzing this issue, it is important to recall the circumstances surrounding the administrative Demand for Inspection. At the time the Demand was issued, there was no prohibition against a physician dispensing, or maintaining, free samples of drugs which had passed their expiration dates. The Board had, in fact, specifically found that Dr. W.C.'s actions in this regard did not violate the Medical Practices

Act or in any way constitute wrongful conduct. Furthermore, the oppressive and overbroad administrative Demand for Inspection authorized the search of Dr. W.C.'s office for anything and everything except outdated or expired drugs. The Appellate Division sidestepped these deep constitutional concerns with a ruling which essentially amounts to "no harm, no foul."

The Appellate Division goes on to state that this problem will not arise in the future, as a new regulation, *N.J.A.C.* 13:35- 7.5(b), now specifically provides that a "practitioner shall not maintain" outdated medication, and that *N.J.S.A.* 45:1-18 expressly authorizes administrative searches based upon violations of specific regulations. 7a-8a. Of course, such provision in no way protects against a reoccurrence of the abusive conduct which took place in this case.

There still remains no avenue for judicial review of an administrative Demand for Inspection which, as in this case, goes far beyond the bounds permitted by regulation, statute or constitutional law. Under the Appellate Division's ruling, the defendants remain free to use their extortionate tactics to force compliance with demands for illegal searches, not subject to any form of prior judicial review.

The Appellate Division's holding of mootness also ignores the serious impact which even "stayed" administrative penalties, or a "temporarily" suspended license, may have on a medical practitioner's career. Any adverse action report, even a stayed fine, can result in the inability of a physician to obtain or maintain hospital privileges or managed care contracts. As such, serious repercussions can be anticipated from even "stayed" or "temporary" actions. Moreover, W.C. is now considered by the Board to be a "first offender." Were she to engage in any further wrongdoing, she would be subject to enhanced penalties as a "repeat offender."

Under the Appellate Division's handling of this case, the judicial system stood idly by while the government engaged

in the worst sort of coercion of a private citizen, and then declared the case "moot" after the citizen caved in to irresistible governmental pressure. This is patently unfair. While the Government may seek to invoke the aid of the court in enforcing its considerable powers against a citizen, the citizen is deprived of a concomitant right to seek the court's protection from an overreaching government. This cannot be the present state of the law.

POINT II

THE NEW JERSEY SUPREME COURT ERRED BY FAILING TO HOLD *N.J.S.A.* 45:1-18 UNCONSTITUTIONAL.

The Board's statutory authority to conduct investigations, either directly or through the Attorney General, is set forth at *N.J.S.A.* 45:1-18. Pursuant to *N.J.S.A.* 45:1-15, that statute is applicable not only to the Board, but to all boards and all professions or occupations regulated throughout New Jersey, including cosmetologists, morticians and plumbers. None of these Boards, including the Board of Medical Examiners, has promulgated any rules governing the frequency or timing of warrantless inspections or the procedures that inspectors must follow in order to conduct a warrantless inspection. The Fourth Amendment to the Constitution of the United States restricts the ability to conduct legislatively authorized warrantless inspections to carefully defined classes of cases, in accordance with clearly delineated rules. These restrictions are applicable to the States through the Fourteenth Amendment. *Ker v. California*, 374 U.S. 23, 30 (1963).

This Court has considered the constitutionality of warrantless inspections. In *Camera v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), the Court found that a governing principle of the fundamental purpose of the Fourth Amendment, justified by both history and by

current experience, is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 387 U.S. at 528-29.

In *Camera*'s companion case, *See v. City of Seattle*, 387 U.S. 541 (1967), the Court stated that in order to satisfy the requirements of the Fourth Amendment, an administrative subpoena must be sufficiently specific and limited in scope to a relevant purpose, and a subpoenaed party is entitled to judicial review of the subpoena prior to being subject to penalties for failure to comply. 387 U.S. at 545-6.

The United States Supreme Court has recognized narrow circumstances where warrantless searches are permissible in connection with a narrowly drawn legislative scheme targeting specific industries. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor dealers); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms dealers); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining industry); *New York v. Burger*, 482 U.S. 691 (1987) (automobile dismantlers). In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) the Court struck down as unconstitutional a legislative inspection scheme in OSHA, which is nearly identical to the regulatory scheme set out at *N.J.S.A.* 45:1-18.

In conclusion, the only time the Constitution does not compel a warrant is when Congress or the State Legislature has reasonably determined that warrantless searches are necessary to further a regulatory scheme involving an inherently notorious industry. Then, and only then, government may impose warrantless searches but only if its regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes and where safeguards exist to challenge the attempted search prior to enforcement.

In blatant contravention of these requirements, the Attorney General demanded the opportunity to immediately inspect the entire contents of Dr. W.C.'s office, with no right to obtain prior judicial review of the reasonableness of that demand. It then fined W.C. for refusing to comply, while simultaneously and aggressively thwarting any opportunity for judicial review. The Appellate Division erred in failing to find *N.J.S.A.* 45:1-18 unconstitutional, and the New Jersey Supreme Court erred in failing to grant certification and remedy the intermediate appellate court's error.

POINT III

THE NEW JERSEY SUPREME COURT ERRED IN FAILING TO CORRECT THE APPELLATE DIVISION'S APPLICATION OF THE INCORRECT CONSTITUTIONAL STANDARD IN ANALYZING THE ADMINISTRATIVE DEMAND FOR INSPECTION.

Finally, the New Jersey Supreme Court erred in upholding the Appellate Division's misconstruction of this Court's cases dealing with "closely regulated" industries. In so doing, the courts below engaged in circular reasoning:

> We read nothing in *Burger* [*New York v. Burger*, 482 U.S. 691 (1987)] or the other United States Supreme Court cases which prohibit the legislature from delegating to an administrative agency the authority to adopt regulations which satisfy the constitutional three prong test announced in *Burger*.

11a. While this is no doubt true, as far as it goes, it begs the question at issue in this case.

Of course, if the administrative Demand for Inspection in this case did, in fact, satisfy the "constitutional three prong test announced in *Burger*," this action would have been

unnecessary, and the defendants would not have resisted so strenuously the plaintiffs' efforts to have it considered by a court.

The problem in this case was that the administrative Demand for Inspection did not satisfy the "constitutional three prong test announced in *Burger*." Under the Appellate Division's ruling, as endorsed, *sub silentio*, by the New Jersey Supreme Court, no court can pass on the question of whether a Demand does so satisfy the test mandated by the this Court. Under the Appellate Division's conceptualization, since the legislature enacted the enabling statutes and the Attorney General issued his Demand pursuant to those statutes, each and every demand must be presumptively, irrebuttably and *per se* constitutional and valid.

This, of course, cannot be so. The undisputed facts of this case show that this is not so. Governmental enforcement agencies do make mistakes, do overreach and do act improperly and coercively. When this happens, it is the sacred responsibility and duty of the courts to intervene and protect the constitutional rights of individual citizens, before those citizens are forced to chose between forfeiture of their constitutional rights or potential destruction of their professional careers.

CONCLUSION

For the foregoing reasons, The Medical Society of New Jersey and Dr. W.C. respectfully urge that this Court grant certiorari and correct the decision of the New Jersey Supreme Court by reversing the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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